Silverado Mining Company, Inc. and Road Fork Trucking Company, Inc. *and* United Mine Workers of America. Case 9–CA–30464

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On October 28, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed a limited exception and a supporting brief in which he contends that the judge erred by failing to find that the Respondent had engaged in direct dealing with unit employees in violation of Section 8(a)(5) and (1) of the Act.[1]

We find merit in the General Counsel's exception. The judge noted in his decision that he was not ruling on whether the Respondent had engaged in direct dealing with unit employees because the General Counsel failed to allege that violation in the complaint issued prior to the hearing. We have reviewed that complaint and find that the judge overlooked paragraph 9(b), which states:

> About February 25, 1993, Respondents, by Scherry Birchfield, at her office, bypassed the Union and dealt directly with employees in the Unit by soliciting employees to enter into individual contracts.

The complaint further alleges that this conduct violated Section 8(a)(5) and (1) of the Act.

The judge also asserted that the direct dealing issue had not been fully litigated relying on the erroneous premise that Birchfield had not been implicated in any unfair labor practice allegation. The record, as well as the judge's factual account, reveals that Scherry Birchfield testified without contradiction that she, acting as the Respondent's agent, offered individual employment contracts to unit employees when the Respondent knew that the Union represented them. Consequently, we find that the issue has been fully and fairly litigated and that the Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees it represents. In all other respects we affirm the judge's rulings, findings,[2] and conclusions.

[1] The Respondent has filed a ''response to the NLRB proceeding'' which does not except to any aspect of the judge's decision, but lists remedial measures it apparently is now offering to implement. The General Counsel has filed no response. We find that the Respondent's response may more appropriately be considered in the compliance stage of this proceeding.

[2] We correct an apparent error in the judge's findings that states that the Respondent's suspension of its employees for their union activities lasted until August 5, 1993. The correct date is April 5, 1993.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Silverado Mining Company, Inc. and Road Fork Trucking Company, Inc., Panther, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the modified Order.

1. Insert as paragraph 1(g) and reletter the subsequent paragraphs.

''(g) Bypassing the Union and dealing directly with employees it represents.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT declare that union organization would be futile as the Company would never accept a union or sign a contract.

WE WILL NOT inform laid-off employees that there will be no work for those who refuse to accept our offer of employment terms, but continue to insist on collective bargaining.

WE WILL NOT offer wage increases only to employees who agree to reject the Union.

WE WILL NOT threaten to discharge those who persist in seeking union representation.

WE WILL NOT interrogate employees concerning the union activity of coworkers.

WE WILL NOT offer work to laid-off employees only if they reject union representation.

WE WILL NOT discourage union membership by suspending or in any other manner discriminating against employees with respect to wages, hours, or other terms, conditions, or tenure of employment.

WE WILL NOT bypass the Union and deal directly with the employees it represents.

WE WILL NOT refuse to recognize and bargain in good faith with the Union concerning the wages, hours, and working conditions of employees in the unit appropriate for purposes of collective bargaining, described below:

> All employees employed at Respondent's Avondale, West Virginia mine, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, the employees listed below for losses each sustained by reason of their discriminatory suspension:

Willie Estep	Scottie Justice
Dennis Justice	Dexter Bailey
Roger Johnson	James Cline
Amos Hicks	

WE WILL, on request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, and embody any understanding reached in a signed agreement.

SILVERADO MINING COMPANY, INC. AND ROAD FORK TRUCKING COMPANY, INC.

James Horner, Esq., for the General Counsel.
Robert E. Blair, Esq., of Welch, West Virginia, for the Respondent.
J. Sebert Pertee, International Representative, of Welch, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Beckley, West Virginia, on July 27 1993, upon an original unfair labor practice charge filed on March 22, 1993, and a complaint issued on March 31, 1993, alleging that the Respondent independently violated Section 8(a)(1) by coercively interrogating employees concerning union activity, by threats of discharge if employees refused to abandon union activity, by declaring that organization would be futile as it would never execute a union contract, and by offering benefits if employees agreed to reject union affiliation. The complaint further alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending seven employees in reprisal for union activity, and further violated Section 8(a)(1) when the laid-off employees were subsequently informed that they would be reinstated only upon renunciation of the Union. Finally, the complaint on authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), seeks a remedial bargaining order on grounds that the violations of Section 8(a)(1) and (3) are sufficiently serious to make the possibility of a fair election in the future slight even if held under protection of conventional Board remedies. Accordingly, it is alleged that the employee desires evident from their execution of union authorization cards is best protected by a bargaining order, and that Respondent violated Section 8(a)(5) and (1) of the Act by refusing, upon request, to bargain with the Union, as majority representative of said employees. In its filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, a brief was filed on behalf of the General Counsel.

On the entire record,[1] including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Silverado, a corporation, at times material, has maintained an office in Panther, West Virginia, and has been engaged in the operation of a bituminous coal mine near Avondale, West Virginia. In the course of that operation, Respondent Silverado, during the 12-month period prior to issuance of the complaint, sold and shipped from its Avondale, West Virginia facility goods valued in excess of $50,000 directly to Metcoal, Inc. (Metcoal), a nonretail enterprise located in the State of West Virginia.

At times material, Metcoal, a corporation, with an office in Welch, West Virginia, has been engaged in the business of purchasing and selling coal. During the 12-month period prior to issuance of the complaint, Metcoal, sold and shipped products from its Welch, West Virginia facility valued in excess of $50,000 directly to points located in the State of West Virginia. At all times material, Metcoal has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer does not deny, and I find that, at all times material, Respondent Silverado has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, Road Fork, a corporation, at times material, from its facility in Panther, West Virginia, has been engaged in the interstate transportation of coal by truck pursuant to contract with Respondent Silverado.

At all times material, the Respondents, Silverado and Road Fork, have been affiliated business enterprises with common officers, ownership, directors, management and supervisors; have formulated and administered a common labor policy affecting employees of the Respondents; have shared common premises and facilities; have provided services for each other; and have held themselves out to the public as a single-integrated business enterprise.

The complaint alleges, the answer admits, and I find that Silverado and Road Fork (the Respondent), constitute a single integrated business enterprise and a single employer within the meaning of the Act.

[1] Inadvertent errors in the official transcript of proceeding have been noted and corrected.

Accordingly, I find that, at all times material, Respondent Road Fork has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer does not deny, and I find that the United Mine Workers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

Prior to the events in issue here, the Respondent operated a nonunion mine near Avondale, West Virginia, the sole site involved in this proceeding. Organization activity began on February 15, 1993,[2] when one of the Respondent's employees, Amos Hicks, contacted Sebert Pertee, a UMW International representative. Pertee was informed that, as of February 16, daily wages at the Respondent's mine were to be cut from $90 to $80,[3] and for that reason the employees sought union intervention.

Pertee met with the employees on Wednesday, February 17.[4] All seven employees attended. Pertee was accompanied by another UMW International representative, Bernard Evans. The employees complained that they were not making a living adequate to support their families, and requested that the UMW bargain for them. They were informed as to the procedures. All seven employees used that occasion to sign authorization cards.[5]

Immediately after the meeting, Pertee and Evans drove to the mine where they introduced themselves to Howard Bailey, the former president and owner of the Respondent, and husband of the current president and owner. Pertee informed the latter that they had just met with the employees and all signed authorization cards indicating their desire for representation by the UMW. Pertee advised Bailey that he would ''like to set a date with him to sit down and negotiate a contract.'' Bailey responded, ''Well, you've just fired all those men.'' Pertee stated that he did not want them to be fired. He explained that they want to be represented by the UMW and he was there for that purpose. Bailey then stated, ''This mine . . . is non-union and going to stay non-union,'' adding that he could not afford the Union, inviting Pertee to examine the Company's books. Pertee declined with the observation that he was not versed in such matters, adding that the Union had auditors, who if necessary would do so.

During the conversation, all seven authorization cards were presented to Howard Bailey, who, together with Michael Anderson, the Respondent's vice president, examined them individually, leading the latter to state, ''That's all of them except the boss.'' Bailey reminded the union representatives that the mine would remain nonunion, and reiterated that ''them men just fired themselves when they signed them cards.''[6] Nevertheless, the meeting ended with an exchange of telephone numbers.

That same evening, at about 9 p.m., Pertee received a telephone call from Howard Bailey. The latter advised that he had authorized Scherry Birchfield to show Pertee the books which would prove that he was broke, and that he had overdrawn checks.[7] He again urged Pertee to examine the books.

Shortly thereafter, Pertee received a telephone call from Birchfield. She informed Pertee that she had been authorized to show him the books, and informed as to her availability to facilitate the inspection, while reenforcing Howard Bailey's plea that he was not making money and had ''several bad checks out.''

About 15 minutes later, Bailey again telephoned Pertee. He inquired as to whether Pertee had been contacted by Birchfield, and stressed that he could not afford to go Union. Pertee replied that ''everything was negotiable,'' but that he was incapable of reviewing the books and would not do so.

B. *The Threshold Unfair labor Practices*

1. The telephone calls of February 17

The complaint alleges that the Respondent violated Section 8(a)(1) when on or about February 17, David Cline, the mine supervisor, telephoned the employees and interrogated them concerning union activity, while threatening discharge if it persisted.

Amos Hicks testified that, after the September 17 meeting with the union representatives, David Cline telephoned, stating:

> Amos, I didn't think this of you. . . . I thought that you wasn't a troublemaker . . . but I believe you're an instigator and a union radical. . . . [F]urthermore, I don't believe I can work with you, Dexter[,] Bailey or Willie Estep in the future . . . I thought you were a good guy to work with and I had a lot of confidence in you.

In addition, according to Hicks' uncontradicted testimony, Cline indicated that he wanted the men to rescind the union cards, stating that there was work, but if they did not do so, and it goes union ''there won't be no more work.''

Another employee, Dexter Bailey, testified to a similar call. He avers that Cline declared that ''there would be no more work because of the signing of the cards and trying to get Howard to go Union.'' Dexter Bailey replied that the men would be there the next morning and they could discuss

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[2] All dates refer to 1993.

[3] Employees were informed of the wage cut on February 9. See G.C. Exhs. 4, 6, and 7.

[4] No operations had been scheduled for the mine that day.

[5] G.C. Exhs. 3(a) through (g).

[6] While Bailey's remarks to the organizers evidenced a strong union animus, the General Counsel concedes that, as no employees were within earshot, no violation inured in this respect. To further clarify, I have not overlooked testimony by employee Amos Hicks that Pertee telephoned him that evening, and reported all of Howard Bailey's statements after he viewed the signed cards. Pertee's election to pass on these remarks to Amos Hicks was a matter of personal choice and was not the type of transcommunication that could be binding upon the Respondent.

[7] Birchfield, an admitted agent of the Respondent, and a freelance bookkeeper, was retained by the Respondent to provide accounting services.

Howard Bailey's proposal then. Cline stated, ''No, he wouldn't be there . . . there wouldn't be no more work.''[8]

The facts do not substantiate any unlawful interrogation. However, based upon the credited testimony of Hicks and Dexter Bailey, I find that the Respondent violated Section 8(a)(1) when David Cline threatened that they would lose their jobs as a reprisal for union activity.

2. The suspension and related events

a. *The February 18 shutdown*

On February 18, the miners, with the exception of James Cline, reported to work.[9] This effort was frustrated because, no one from supervision or management was present. The men waited for about an hour-and-a-half, but when no one from management appeared, they left.

b. *The February 19 meeting*

Later on February 18, the Respondent informed the employees that a meeting would be held at the mine the next day. It was attended by all seven employees. At their invitation, Pertee appeared, along with Everett Acord, the president of UMW, District 29.[10]

Bailey opened the meeting by stating that he wanted the men to vote ''right there in the mine office, in everbody's presence, on whether they wanted to keep their jobs or not.'' Pertee replied that ''if there's an election conducted here . . . the National Labor Relations Board will conduct it, not you.'' Bailey became upset, repeating that:

> [T]he mines was non-union and was going to stay that way, and, *if the men worked there*, that he would not sign nothing with [Pertee's] . . . name on it, or the United Mine Workers' name. [Emphasis added.]

Nevertheless, Pertee made an offer to resolve the matter, as follows:

> (1) The men would be returned to work at a rate of $100 daily.
>
> (2) The men would receive a hospital card.

Bailey reacted by stating that there would be no contract with the Union and that if there were a contract ''it would be between him and the men, and nothing to do with the Union.'' Bailey then indicated that he would have an attorney and Birchfield draft a ''statement,'' which would be notarized and signed by the individual employees, ''because I won't fire them if they perform their duties, if they do their work.'' Pertee replied:

> [The] men didn't want to sign nothing, that I was willing to set down and try to negotiate a contract for them men.

Bailey then reiterated that he would not sign a contract with Pertee or the UMW.

Nevertheless, the union representatives then caucused with the employees. The employees indicated that they would be willing to accept $90 per day and the promise of a hospital card in 90 days. However, before their proposal could be communicated, Bailey had left the site.

The foregoing substantiates that during the February 19 meeting the Respondent violated Section 8(a)(1) of the Act when Howard Bailey implied that there would be no work for the men who refused his offer of individual employment contracts, while declaring that he would never enter any agreement with the Union.

c. *The February 22 meeting*

Howard Bailey scheduled a second meeting with the men for February 22 at 1 p.m. At the appointed time, Pertee, who had been alerted by Hicks to Bailey's intention, met the employees and escorted them to the mine office.[11] At the outset, Bailey asked Pertee for his proposal. Pertee replied that they would take $90 a day and a grievance procedure to protect their jobs ''from unlawful firing.'' Bailey replied that if the men go back to work, it would be under his terms. He repeated that the mine was nonunion, would stay that way, and that he would not sign a contract with the Union. He said that the men were aware of his proposal and that he would provide a medical card when he could afford it. He added that there was a document at the bookkeeper's office and that ''the men could go down there and sign it and go to work tomorrow under his conditions.''

The complaint alleges that the Respondent violated Section 8(a)(1) when on Monday, February 22, Howard Bailey offered wage increases if the employees agreed to reject the Union, but discharge if they continued to insist that the Respondent execute a collective-bargaining agreement with the Union. I agree that the plain meaning of Howard Bailey's remarks on that occasion was that the employees could return to work, but only upon acceptance of his terms, which did in fact provide for a wage increase. (See G.C. Exh. 2.) In both respects, the Respondent thereby violated Section 8(a)(1) of the Act.

The February 22 meeting would prove to be the last contact between the Union and the Respondent. On March 5, the Union filed the initial unfair labor practice charge in this proceeding.

d. *The interrogation of February 22*

The complaint alleges that the Respondent violated Section 8(a)(1) when on February 22, David Cline interrogated an employee concerning union activity of coworkers.

Dexter Bailey testified that on February 22, David Cline called him at home, asking who had started all the trouble. Bailey replied that all had signed cards, so all were responsible. Cline stated that if they did not want to work for $80

[8] Scott Justice testified that on September 17, David Cline telephoned him to report that there would be no work until further notice, while offering no explanation as to why.

[9] James Cline is the brother of mine supervisor, David Cline.

[10] When Pertee attempted to introduce Howard Bailey to Acord as the ''owner of the mines,'' Bailey denied that this was the case. In this respect, it appears that Howard Bailey some months earlier transferred ownership to his wife, Ruth Bailey, in a transaction unsupported by any consideration. Ruth Bailey testified that she took no active role in the business, which continued to be managed by her husband.

[11] Only six employees were present. James Cline, the brother of Supervisor David Cline, was not with the others, but he was at the mine itself.

a day, the men should not have taken the job to start with. Ultimately, they argued until Dexter Bailey hung up. The inquiry, in context of Cline's remark that the employees were wrong in accepting employment, while grieving the wage cut, was coercive under any standards. Accordingly, I find that the Respondent violated Section 8(a)(1) in this respect.[12]

e. *The offers of February 25*

On or about February 22, Howard Bailey contacted Scherry Birchfield, advising that he was interested in getting the men back to work and reopening the mines, and, to that end, he instructed her to draft individual agreements providing for a daily straight time wage of $90. The terms were never shown to the Union. Each proposed as follows:

> 1. I will agree [to] work for Silverado Mining Company for $11.25 per hour based upon a 40 hr. work week, with overtime in excess of the 40 hours.
>
> 2. When Silverado Mining Company becomes more financially stable and can afford to, the company will furnish each employee with a medical card. [G.C. Exh. 2.]

The employees traditionally were paid at the mine site. However, on February 25 they were directed to pick up their paychecks at Birchfield's office. According to Birchfield, as the employees reported to her office to collect their pay, she asked them to review the agreement and sign if they wished. All refused to sign without union representation.[13] For example, Amos Hicks testified that after he refused, Birchfield said, ''I can tell you now, Howard won't be Union.'' Dexter Bailey and Willie Estep testified to similar exchanges with Birchfield.[14]

In addition, along with their paycheck, each was given the following document, which bore the signature of Ruth Bailey:

> Work is scheduled to resume at your regular shift on March 1, 1993. If you do not report to work, your employment will be terminated. [G.C. Exh. 5.]

As far as this record discloses, this was the first offer of employment to the employees since the February 18 shutdown that, at least facially, was not contingent upon repudiation of the Union.

f. *March 1; the men report to work*

On March 1, Amos Hicks, Willie Estep, Scottie Justice, Dexter Bailey, and Dennis Justice reported for work at about 5:30 a.m. According to Hicks' credited, undenied testimony, David Cline addressed them as follows:

> [I]f you think that this job is going to be Union, there will be no work at this mine. . . . [I]f you boys want to pull them Union cards, . . . there will be work, but if you don't, there will be no work.

Cline stated that there would be no work for them that day.[15]

g. *Concluding findings as to the suspension*

As indicated, in late February, the men were informed in writing that they would be recalled. However, they did not actually return to work until April 5. Subsequently, they again were laid off on April 9 due to a major equipment breakdown. The complaint includes no challenge to the legitimacy of the April 9 layoff.

As for the shutdown prior to April 5, apart from the elements of timing and general union animus, in this instance, the prima facie evidence of a proscribed motive includes credited, undenied evidence that the men were told by David Cline that work was available, but only if the employees repudiated their support of the Union. For this reason, and as the Respondent has declined to provide any other explanation for the denial of work during the interim, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by the suspension of its employees between February 18 and August 5.

h. *The conditional offers of reinstatement*

At the hearing, the complaint was amended to include allegations that Howard Bailey on March 25, and David Cline on April 16, offered reinstatement to various employees contingent on their withdrawal of union support. I have been advised, and am aware of no evidence substantiating the March 25 conduct imputed to Howard Bailey.

As for David Cline, Dexter Bailey testified that on April 16, David Cline called him and asked if the men would vote to go nonunion in exchange for employment at $100 a day and a hospital card when it could be afforded. Bailey replied that he would do whatever the other men elected to do.

Amos Hicks testified that on or about April 19, David Cline telephoned him, and apologized for calling Hicks a union radical, instigator, and troublemaker. He explained that

[12] Scott Justice testified that he also received a call from Cline that evening, in which Cline simply asked how the meeting had gone. Justice then explained the Union's proposal. This was not an inquiry as to any matter likely to impede organizational activity, and any 8(a)(1) allegation based thereon is dismissed.

[13] Birchfield could not recall that any employee requested a copy of the document. Dexter Bailey testified that he requested a copy, but Birchfield refused.

[14] By way of posthearing brief, the General Counsel for the first time argues that the Respondent violated Sec. 8(a)(5) and (1) of the Act when Birchfield engaged in ''direct dealing'' with the employees. In this regard, I note that Birchfield was admitted to be an agent by the Respondent, as part of a complaint that, as drafted and amended, implicated her in not a single unfair labor practice allegation. At the same time, I cannot accept that the General Counsel, prior to hearing did not have clear evidence as to her role in this matter. Aside from the fact that the issue was not fully litigated, I find it difficult to attribute an omission of such proportion to ordinary neglect. No finding is made with respect to the merits of this unalleged contention.

[15] Cline's March 1 remark to the suspended employees is among several obvious violations which are not alleged in the complaint. The General Counsel added 8(a)(1) allegations at the hearing, but offered no explanation as to why these additional offenses had been omitted. Where relief is sought under *Gissel*, it seems inexcusable to go to the trouble of adducing evidence as to serious misconduct, while allowing them to go unpled either through the original complaint or amendment. Nevertheless, here as in other instances, considering the failure of the Respondent's counsel to cross-examine on these issues, while not presenting an evidentiary case, I am unwilling to conclude that the unalleged unfair labor practices were litigated under conditions sufficient to warrant redress.

Howard Bailey shut down the mine out of anger at the paper he received from the Union, adding that the men could work for him if they rescinded their union cards. If they did, Cline stated that he would try to work something out with Howard Bailey so that the men would receive the $90 straight time daily wage and a hospital card. Hicks replied that it was not up to the men, but the NLRB and the Union.

The testimony of Hicks and Dexter Bailey has not been refuted and based thereon I find that the Respondent violated Section 8(a)(1) of the Act by additional offers of employment contingent upon employee rejection of union representation.

C. *The Alleged Refusal to Bargain*

1. The appropriate unit

The complaint alleges that the following employees constitute an appropriate unit within the meaning of Section 9(b) of the Act:

> All employees employed at Respondent's Avondale, West Virginia mine, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

There is no challenge to the propriety of this unit, which is the analogue of a presumptively appropriate single plant unit. See, e.g., *Hegins Corp.*, 255 NLRB 160 (1981); *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980). I find, as alleged in the complaint that the above employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The demand for recognition

There was no written demand. However, the Respondent admits the allegation that on February 17, the Union orally requested recognition and that the Respondent bargain collectively with it as the exclusive representative of employees in the appropriate unit. It is concluded that this was the case.

3. The Union's majority

Testimony reveals that at the time of the events in issue here, the following employees were employed in the above-described unit:

Willie Estep	Scottie Justice
Dennis Justice	Dexter Bailey
Roger Johnson	James Cline
Amos Hicks[16]	

Union Representative Pertee testified that he personally witnessed execution of cards by all seven employees at the meeting held on Wednesday, February 17. His testimony as to all seven cards was corroborated by that of employees Amos Hicks and Dexter Bailey. Moreover, Howard Bailey and Michael Anderson do not deny that, on February 17, they examined all seven cards. I find that the credited testimony establishes that on February 17, all seven of the employees in the appropriate unit executed valid, single purpose, authorization cards, designating the Union as their bargaining representative.

4. The appropriateness of a bargaining order

This is a case where immediately after the Respondent was presented unmistakable evidence that all unit employees had designated the Union, it sought to defeat employee choice by a campaign of ''hallmark'' violations. See, e.g., *Astro Printing Services*, 300 NLRB 1028 (1990). The effort to thwart unionization was waged by the Respondent's operating officials who served at the highest levels. *Vemco, Inc.*, 304 NLRB 911 (1991). It opened with Howard Bailey's firm, later to become persistent, declaration that the mine would not be operated on a union basis and that he would never sign a collective-bargaining agreement. Assurance that this would be the case was simultaneously demonstrated by the February shutdown of the mine, which dislocated the entire work force without indication of whether the loss of work would be temporary or permanent. Four days later the employees were informed that they would be permitted to return to work. However, to do so, would require rejection of the Union. This ''bitter-sweet'' proposal was capped by an offer to restore the $10 cut in daily wages and the promise of a hospital card when fiscal conditions permitted—an offer designed to neutralize the ''very problem that had led employees to seek union representation in the first place.'' See *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 (1993). Moreover, as in that case:

> [T]he layoff and recall served abrupt, graphic, and indelible notice on all employees that the Respondent controlled their employment, to the exclusion of any outside agency that might seek an improvement in their conditions of employment.

Even after the unlawful suspension, the lingering effects of this dramatic action affecting the entire bargaining unit were rekindled when David Cline again informed an employee that work would be contingent upon rejection of the Union.

In this light, the unlikelihood that consequences of these serious unfair labor practices might be erased by the passage of time or pursuant to traditional Board remedies impels the conclusion that the ''cards . . . [are] . . . the most effective—perhaps, the only—way of assuring employee choice.'' *NLRB v. Gissel Packing Co.*, 395 U.S. at 602. I find that a bargaining order is an appropriate form of corrective relief in this proceeding, and that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing, on request, since February 17, 1993, to recognize and bargain with the Union as exclusive representative of employees in the appropriate unit. *Interstate Truck Parts*, 312 NLRB 661 (1993).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act when on February 19, Howard Bailey implied that there

[16] Howard Bailey, the former owner, and husband of the present owner; Michael Anderson, a vice president; the Bailey's son-in-law; and David Cline, the mine supervisor was also involved in the operation of the mine. Their exclusion from the unit is warranted on the basis of undenied allegations in the complaint and the testimony of Ruth Bailey, the president and owner.

would be no work for the men who refused his offer of individual employment contracts, while declaring that he would never enter any agreement with the Union.

4. The Respondent violated Section 8(a)(1) when on February 22, Howard Bailey offered wage increases to employees who agreed to reject the Union, but threatened discharge in the case of those who persisted in seeking union representation.

5. The Respondent violated Section 8(a)(1) when David Cline, on February 22, interrogated an employee concerning the union activity of coworkers.

6. The Respondent violated Section 8(a)(1) of the Act on April 16 and 19, when David Cline offered work to laid-off employees if they rejected union representation.

7. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees listed below between February 18 and April 5, 1992, in reprisal for their union activity.

Willie Estep	Scottie Justice
Dennis Justice	Dexter Bailey
Roger Johnson	James Cline
Amos Hicks	

8. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed at Respondent's Avondale, West Virginia mine, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

9. At all times since February 17, 1993, the Union has been designated by a majority of unit employees and is the exclusive bargaining representative of said employees.

10. The Respondent, at all times since February 17, 1993, has violated Section 8(a)(5) and (1) of the Act by refusing, on request, to recognize and bargain with the Union.

11. The unfair labor practices found above have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

The Respondent, having suspended its seven employees unlawfully shall be ordered to make them whole for loss of wages and benefits incurred between February 18, 1993, and April 5, 1993, when they were recalled under conditions not shown to have been inappropriate. Backpay due under the terms of this recommended order shall include interest as authorized in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Silverado Mining Company, Inc., and Road Fork Trucking Co., Panther, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Declaring that union organization would be futile as the Company would never accept a union or sign a contract.

(b) Informing laid-off employees that there would be no work for those who refuse to accept the Respondent's offer of employment terms, but continue to insist upon collective bargaining.

(c) Offering wage increases to employees who agreed to reject the Union, while threatening to discharge those who persist in seeking union representation.

(d) Interrogating employees concerning the union activity of coworkers.

(e) Offering work to laid-off employees if they reject union representation.

(f) Discouraging union membership, by suspending or in any other manner discriminating against employees with respect to wages, hours, or other terms and conditions or tenure of employment.

(g) Refusing to recognize and bargain in good faith with the Union concerning the wages, hours, and working conditions of employees in the unit appropriate for purposes of collective bargaining, described below:

> All employees employed at Respondent's Avondale, West Virginia mine, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, the employees listed below for losses each sustained by reason of their discriminatory suspension:

Willie Estep	Scottie Justice
Dennis Justice	Dexter Bailey
Roger Johnson	James Cline
Amos Hicks	

(b) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Upon request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, and embody any understanding reached in a signed agreement.

(d) Post at its facilities in Panther, West Virginia, and any other location where notices to employees are customarily

[17] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

posted, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''